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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 65

TIMOTHY F. LEARY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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Motion of American Civil Liberties Union for Leave to File a Brief *Amicus Curiae*

The American Civil Liberties Union moves for leave to file the attached brief as an *amicus curiae* in support of the petitioner. We believe that the Fifth Amendment privilege against self-incrimination would be violated by permitting prosecutions for failure to comply with the registration and tax requirements of the Marihuana Tax Act.

Consent to our filing of a brief *amicus curiae,* has been granted by petitioner, but has been refused by respondent. (Respondent had offered to consent to the filing of such brief if it could be filed at least ten days prior to the September 9, 1968 deadline for the filing of respondent's brief on the merits, but was unwilling to consent when advised that we were unable to meet this condition.)

Respondent in effect does not contest that the Marihuana Tax Act, if applied as written, would violate petitioner's privilege against self-incrimination, as amplified by the recent cases of *Marchetti* v. *U. S.*, 390 U. S. 839 (1968); *Grosso* v. *U. S.*, 390 U. S. 62 (1968); and *Haynes* v. *U. S.*, 85 (1968), applying the principle of *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965). On this point, respondent relies entirely on its construction of the Marihuana Tax Act to forbid voluntary payment of the required $100 per ounce excise tax. Petitioner's conviction rests upon his failure to pay such tax. We believe that arguments bearing upon the correctness of the respondent's construction of the statute have not been fully presented. Moreover, the parties have not adequately presented the question whether the conviction may be affirmed even if respondent's construction of the statute were correct. It is relevant to consider here whether the mere attempt to comply with the statute as written would have been incriminatory even though, under respondent's construction, officials of the Government would have been duty bound to frustrate petitioner's attempt to comply. Moreover, it is relevant to consider the question of whether the construction advocated by respondent could be applied without violating various other constitutional and statutory rights of petitioner. We believe that the issue framed as to the Marihuana Tax Act in the grant of certiorari requires consideration of these other rights both in determining the proper construction of the Act, and if the Act is to be construed as respondent contends it should be, in determining the validity of the Act.

The arguments in this brief are largely those on a similar point raised by counsel for appellant in *Bartol* v.

United States (D. C. Cir. No. 21,487) now pending before the Court of Appeals for the District of Columbia Circuit. Counsel for the American Civil Liberties Union in this case is court-appointed counsel for Bartol; and an assistant to the Solicitor General who is of counsel for respondent in this case briefed and argued the case for the United States in *Bartol.*

Our brief is limited to the questions relating to the Marihuana Tax Act, and does not discuss the question relating to the validity of the presumption of importation under the Narcotic Drug Import and Export Act, 21 U. S. C. 176a.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union files this Brief in the belief that punishment for acquiring marihuana without having paid the $100 per ounce regulatory excise tax under the Marihuana Tax Act, violates the Fifth Amendment privilege against self-incrimination.[1]

[1] Since the brief bears directly on *United States* v. *Covington*, No. 366, we ask the Court to consider the brief in relation to that case as well.

ARGUMENT

I.

The Marihuana Tax Act requires self-incriminatory payment of tax.

Petitioner has argued that, where he asserts his Fifth Amendment privilege against self-incrimination, he cannot be punished for acquiring marihuana without having paid the $100 per ounce regulatory excise tax. This follows, under the recent Supreme Court decisions in *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 621 and *Haynes* v. *United States*, 390 U. S. 85, since payment of the tax would have required petitioner to furnish information which posed a real threat of his prosecution under various federal and state statutes relating to marihuana. Respondent's sole response on this point is to urge that petitioner was *not required* (nor even permitted) *to pay* the tax prior to acquisition of marihuana. This remarkable contention might be answered most directly by merely noting that petitioner has been indicted and convicted for "being a transferee of marihuana *required to pay*" the tax who obtained marihuana without having paid such tax; if he is not "required to pay" he is not guilty.

Respondent's contention was succinctly answered in the opinion of the District Court filed May 6, 1968 on the Government's motion for reconsideration in *United States* v. *Covington*, S. D. Ohio, Crim. No. 9041, Jurisdictional Statement filed, August 1, 1968, No. 366, O. T. 1968. In its order of March 27, 1968, the district court had dismissed an indictment under 26 U. S. C. §4744(a) upon defendant's motion based on *Grosso*, *Haynes* and *Marchetti*. The Gov-

ernment's Memorandum in support of its petition for reconsideration then raised for the first time the same argument raised here by respondent. The Court held as follows:

> The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.
>
> If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741(a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

Respondent's picture of the statute, while evidencing imagination and creativity, can only be appreciated as very modern and not of a representational school. The statute, as enacted by Congress in 1937 and, with its 1956 amendment applicable in this case, is entirely different from this picture in its essential features. The government apparently argues (Respondent's Brief at 21-22) that when Congress declared in 1937 that an unregistered individual such as petitioner must pay $100 per ounce tax before acquiring marihuana it was referring only to individuals in states or other local jurisdictions which did not make the acquisi-

tion of marihuana unlawful. (This argument is stated more directly by the government in its brief in *Bartol* v. *United States*, No. 21,487 (D. C. Cir.) at 27-28.) This seems incredible since the Act makes no such reference to state or local law.

Moreover, respondent would have us believe that Congress thought that it could constitutionally *absolutely prohibit* acquisition of marihuana by such individuals in states which prohibited the acquisition. But if this were so, respondent fails to suggest why Congress would not also have used absolute prohibition rather than resorting to the device of the prohibitory tax rate of $100 per ounce, in the states which respondent claims had no "meaningful (*sic*) laws directed towards the illicit handling of marihuana" (respondent's brief, pp. 21-22)—and all without any reference to a distinction based on state law. (Reference to state law would have been unconstitutional. See *infra*, pp. 25, 27.) In fact, Congress would not have bothered with the tax provision at all if it had thought in 1937 that it had the Constitutional power of such absolute prohibition.

This is confirmed by the legislative history. In the Hearings before the Senate Finance Committee, the representative of the Treasury Department stated that,

> The primary purpose of this legislation must be to raise revenue, because we are resorting to the taxing clause of the Constitution and the rule is that if on the face of the bill it appears to be a revenue bill, the courts will not inquire into any other motive that Congress may have had in enacting this legislation.

Hearings on H. R. 6906 Before the Subcomm. of the Senate Comm. on Finance, 75th Cong., 1st Sess. 8 (1937) (Statement of Clinton M. Hester, Ass't General Counsel for the

Treasury Dep't). See also the similar quotation from Mr. Hester's testimony before the House Ways and Means Committee, Petitioner's Brief at 12. The representative of the Treasury Department further testified as to the Department's concern with the 5-4 Supreme Court decisions upholding the Harrison Act, indicating that the later 6-3 decision in *Nigro* v. *United States*, 276 U. S. 332 (1928), was the result of increased revenue rates added to the Harrison Act after the earlier Supreme Court decisions. He implied that to avoid similar close decisions with the Marihuana Tax Act it would be necessary to provide even more revenue aspects than those contained in the Harrison Act. *Id.* at 8-10, 20. The *Hearings* further indicate that both Congress and the Treasury Department believed that there were laws governing marihuana, of a fairly uniform nature, in every state in the Union. A chart submitted by Mr. Hester showed that all forty-eight States had laws which controlled sale of marihuana. *Id.* at 8-10.

The intended purpose and effect of the Marihuana Tax Act were further expounded in the floor debates which followed submission of the Committee reports.

> The purpose of H. R. 6906 is to develop a plan of taxation that will raise revenue and at the same time render *extremely difficult* the acquisition of marihuana by persons who desire it for illicit uses, and, secondly, the publicizing of dealings in marihuana in order to tax and control the traffic effectively. . . . It is not believed feasible to amend the Harrison Act by inclusion of marihuana, for the reason that its control presents a problem different from that of opium and coca leaves, neither of which are grown in the United States. But marihuana is, and a portion of each plant may be used legitimately. Hence, it seems necessary to pro-

vide a separate bill to cover legitimate dealings in marihuana as well as to control and *prevent, if possible, illicit dealings.*

81 CONG. REC. APP. 1440, 1441 (1937) (Extension of remarks of Rep. Frank H. Buck) (Emphasis added).

In this bill we have presented for the consideration of the Congress a combination of the Harrison Narcotics Act and the National Firearms Act. By it dealers in marihuana must be registered and an occupational tax will be levied on them. Further, a reasonable revenue-producing tax of $1 an ounce is to be placed upon those transfers of marihuana which are legitimate and $100 an ounce placed upon those which are illicit.

81 CONG. REC. 5689 (1937) (Remarks of Rep. Frank H. Buck).

Furthermore, authoritative statements since 1937, including subsequent legislative history, show that §4741(a)(2)'s $100 per ounce tax is indeed required to be paid prior to acquisition of marihuana by an unregistered individual. When the constitutionality of this provision came before the Supreme Court in 1950 in *United States* v. *Sanchez*, 340 U. S. 42, the Government then said, at pages 27-29 of its brief [emphasis added]:

"In the present case, the tax laid by Section 2590 (a)(2) (now 26 U. S. C. §4741(a)(2)) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Section 3230 [4751, 4752] and 3231 [4753]. Such a transfer is not made a crime by the statute, nor is the tax conditioned upon its being shown that the transfer is made crimi-

nal or unlawful by other provisions of law. The only transfers made unlawful by the Act are (1) a transfer not in pursuance of an official order form (Sec. 2591 [4742]): and (2) a transfer *by* a person who has not paid the special tax and registered (Sec. 3234 [4755]). Acquisition of the drug by any person without having paid the transfer tax is also unlawful (Sec. 2593 [4744]). It is thus the failure to pay the tax, either the special or transfer tax, or the acquisition of the drug without a proper order form, which gives rise to criminal liability, and not, as in the *Lipke* and *Constantine* cases, the criminal liability which gives rise to the tax.

It is a constitutional irrelevance, therefore, that the $100 per ounce tax levied by Section 2590(a)(2) [4741 (a)(2)] *may* have a prohibitory effect upon transfers of marihuana to unregistered persons. If Congress can prohibit the transfer of drugs to other than legitimate handlers, as it in effect did under the Anti-Narcotic Act upheld in *Nigro* v. *United States*, 276 U. S. 332, it cannot be an objection to a tax that its effect may be the same as an outright statutory prohibition. If otherwise valid under the Constitution, a tax does not become bad because it is penal in nature. The taxing power clearly permits the imposition of penalties, civil as well as criminal, in aid of collection of revenue. If it had seen fit to do so, *Congress could have imposed an absolute prohibition, enforceable by criminal penalties, upon transfers of marihuana to unregistered persons.* Such a provision would have been clearly constitutional as ancillary to enforcement of the special occupational tax under Section 3230 [4751, 4752] and the $1 per ounce transfer tax under Section 2590 (a)(1) [4741(a)(1)] *That Congress chose instead to im-*

pose a $100 per ounce tax, which would not only accomplish the same result but also provide an additional source of revenue, does not alter the essential validity of its action as an exercise of the taxing power.

Moreover, it should be pointed out in the present case that, like the tax sustained as a civil sanction in the *Mitchell* case, the tax here is collectible by a distinctly civil procedure. The tax is paid by affixing appropriate stamps to the order form (sec. 2590 (c) [4771]); and the Commissioner makes assessments for unpaid taxes (sec. 3311 [6201(a)(2)]), which may be collected by distraint or court proceedings (sec. 3312 (d) [6502(a)]).

The civil character of the tax imposed by subsection (2) of Section 2590(a) [4741(a)] is not defeated by the fact that its amount is very high in relation to that imposed by subsection (1). The cases previously cited (pp. 11-20) make it clear that a tax laid upon a proper subject of taxation is not to be condemned because of its amount. In any event, Congress was fully justified in fixing a higher tax upon transfers of marihuana to persons who had not registered under the law and paid the special occupational tax. It is *obviously unlikely* that such persons will voluntarily report the transfer to the collector and pay the tax due. The higher rate of tax, as in the *Mitchell* case (*supra*, at p. 401), was provided 'primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. [Footnote: Indeed, a tax which is merely nominal in amount might possibly be more vulnerable. *See Nigro v. United States*, 276 U. S. 332, 346-347, 353.]

The Supreme Court, in upholding the validity of the tax as a revenue measure, said

> It is obvious that §2590 [now §4741], by imposing a *severe burden* on transfers to unregistered persons, implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels. Hence the attack here rests on the regulatory character and prohibitive burden of the section as well as the penal nature of the imposition. But despite the regulatory effect and the close resemblance to a penalty, it does not follow that the levy is invalid. . . . .
>
> *First.* It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. *Sonzinsky* v. *United States,* 300 U. S. 506, 513-514 (1937). The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate . . . These principles are controlling here. The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect.
>
> *Second.* The tax levied by §2590(a)(2) [now §4741(a)(2)] is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. *Such a transfer is not made an unlawful act under the statute.* Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then

the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact that Congress provided civil procedure for collection indicates its intention that the tax be treated as such . . . Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. . . .

Nor is the civil character of the tax imposed by §2590(a)(2) [now §4741(a)(2)] altered by its severity in relation to that assessed by §2590(a)(1) [now §4741 (a)(1)]. The difference has a rational foundation. Unregistered persons are *not likely* to procure the required order form prior to transfer or pay the required tax. Free of sanctions, dealers would be prone to accommodate such persons in their unlawful activity. The imposition of equally severe tax burdens on such transferors is *reasonably adapted to secure payment of the tax by transferees or* stop transfers to unregistered persons, as well as to provide an additional source from which the expense of unearthing clandestine transfers can be recovered. 340 U. S. at 44-46. (Emphasis added.)

In enacting the Guam Organic Act of 1956, Congress itself declared its understanding of the Marihuana Tax Act as follows:

The Marihuana Tax Act, enacted in 1937, imposes an annual tax, in the nature of a registration fee, upon persons dealing in marihuana (such as importers, manufacturers, doctors, and research workers), and it

> also imposes a transfer tax upon the transferee with respect to sales, exchanges, and gifts of marihuana. The statute applies to Guam, as well as to the other territories. When the Marihuana Tax Act was enacted, it was supposed that there were legitimate medical needs for the drug. It has since developed that there are not, and section 14 would therefore make this law inapplicable to Guam. *The law has the effect of legitimizing dealings in marihuana, and if no legitimate need exists, it is considered desirable to make the statute specifically inapplicable.*

S. Rep. No. 2662, 1956 *U. S. Code, Cong. & Ad. News* 4062, 4067. (Emphasis added.)

In 1963, the Final Report of the President's Advisory Commission on Narcotics and Drug Abuse, of which Judge Prettyman was chairman, stated:

> The *rate* [under the Marihuana Tax Act] for transfers to persons who are not registered taxpayers is *prohibitory.*
>
> . . .
>
> The amounts collected under the Harrison Act are relatively minor, and the Marihuana Tax Act yields nothing because *the tax rate is deliberately prohibitive.* Taxation is in fact only a guise for law enforcement and regulation.

Commission Report at 32. (Emphasis added.) The Commission went on to recommend:

> New statutory authority should be substituted for the Marihuana Tax Act. The practical purpose of the Act is to limit the acquisition of marihuana by imposing a prohibitory tax on all transfers of marihuana. Ac-

cording to the Commission on Narcotic Drugs of the United Nations Social and Economic Council, "cannabis (marihuana) appears to have no beneficial effects in modern medicine." Thus there is no need to perpetuate the myth of its availability subject to payment of a transfer tax.

Id. at 36.

Respondent's analogy to the Harrison Narcotics Act is misplaced. Under that Act, there are some 394,193 registrants, as compared with 88 under the Marihuana Tax Act, and vast quantities of narcotics are dispensed lawfully for medicinal purposes, whereas marihuana has no accepted medicinal use. *See* Bureau of Narcotics, *Report on Traffic in Opium and Other Dangerous Drugs* 10, 24 (1966). The revenue raising effect of the Harrison Act is arguably substantial, but the Marihuana Tax Act has been described as producing no revenue. *See* Report of President's Advisory Commission on Narcotic and Drug Abuse, *supra*. What it does raise in gross receipts (apart from perhaps $100 annually from registration fees and any amount raised by the $1.00 per ounce tax on acquisitions by registrants) is solely from nonvoluntary collection after transactions have occurred allegedly in violation of the act, as in the present case, and amounts to $418,000 for the period from 1962 through 1965 as compared with $5,813,000, for the same period, for narcotics. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 13 n. 101 (1967).

Since this apparently would not exceed the cost of collection, it was and is doubtful that there is a valid revenue purpose for the Marihuana Tax Act. Thus under the Harrison Act, the taxing power could be used to support the

basic tax on legitimate transactions, and illegitimate transactions might be prohibited as an incident thereto, as held in *United States* v. *Doremus*, 249 U. S. 86 (1919), and *Nigro*, *supra*, according to the Government's Brief in *Sanchez*, *supra*. But since Congress in 1937, while it might not have known that there was *no* medical use for marihuana, knew that there was virtually no use, and since the Harrison Act decisions had been 5–4 and 6–3 with dissenting justices unwilling to sustain even that tax as a revenue measure (*see Hearings*, *supra* at 8-10, 20 for a discussion of congressional concern over the Harrison Act decisions), Congress in the Marihuana Tax Act apparently was unwilling to rely upon a prohibition incident to the basic tax on legitimate transactions, which was too flimsy a revenue base on which to build an "incidental" argument, but rather made maximum use of the taxing power through a $100 prohibitory tax on unregistered, and thus usually illicit, transactions.

Respondent also relies (Respondent's Brief at 18-19, 22) upon its construction of the applicable Treasury regulations. We contend that, properly interpreted, these regulations do not prevent voluntary payment of the tax by one whose acquisition of marihuana would violate state or local law.

Respondent claims that 26 C. F. R. §§152.67 and 152.68 "require the signing of applications for order forms (necessary for payment of the tax) by the same person who signed the registration, with comparison of the two signatures by the district director before the order form may issue." Respondent has omitted the first word of these provisions, *i.e.*, "Generally," which at least creates an ambiguity as to whether there is an absolute signature require-

ment.[2] More important, however, respondent's interpretation of this signature provision as a prohibition against non-registered individuals' obtaining order forms is far-fetched. The provisions are addressed to identifying the applicant, and the district director must be satisfied (generally upon comparison of signatures) "that the application is authentic." Naturally, an applicant for such an order form would "generally" be a §4751 registrant, and thus eligible to pay the $1 per ounce tax under §4741(a)(1). But, in the highly unlikely event that a non-registrable individual[3] were to seek to pay the $100 per ounce tax, if he furnished indisputably satisfactory identification plus his signature, we submit that it is far-fetched to say that the signature regulations mean that he could not pay the tax, merely because the "generally" proper means of identification by comparison with his signature on a registration could not be used. Certainly the regulations should be construed, if possible, to preserve their validity under the statute, and, as previously shown, the statute does not forbid, but rather requires, the payment of tax by such an individual. Finally on this point, it should be noted that these signature regulations have been in existence since 1937 (*see* 26 C. F. R. §§152.47, .48 (1938), whereas the first time *any* "lawfulness" doctrine appeared in the regulations was with the addition in 1949 of then §152.4a (now §152.21) indicating that a *miller* who applied for

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[2] It is arguable by respondent that the use of "generally" only relates to the provision for powers of attorney in the next sentence. Both of these provisions have been in the Regulations since 1937. However, if this were the only intended reference, one would expect the regulation to say "except as provided in this paragraph" rather than "Generally."

[3] *E.g.*, a religious cultist or faddist seeking marihuana for personal use who believed that he could not be indicted for possession under state or federal law or who intended, as a matter of some principle, not to rely on a Fifth Amendment privilege but to expose himself to prosecution.

registration would be investigated as to the lawfulness of his activity under state law. It was not until 1964 that the lawfulness doctrine was extended to cover not only millers, but also all other applicants for registration (§152.22). 29 Fed. Reg. 3758, 3760 (1964). In the general revision of 1964, the transfer tax order form application signature requirements remained unchanged from their 1937 version, but were renumbered as §§152.67 and 152.68. Since the signature requirement for transfer tax antedates by 27 years the adoption of the lawfulness requirement for registration and annual tax, it seems wrong to read the signature requirement as anything but an identification provision.[4]

The regulation, 26 C. F. R. §152.23, which purports to require an application for §4751 registration to show that the proposed operation is lawful in the relevant jurisdiction is irrelevant in the present case and, incidentally, invalid. It is irrelevant because petitioner was charged, in effect, with failure to pay the §4741(a)(2) tax of $100 per ounce applicable to non-registrants, and respondent has not shown that petitioner was a dealer, researcher, or other type of person eligible for §4751 registration regardless of the legality of such activity.[5] As respondent concedes, the Marihuana Tax Act does not contain a provision like 26 U. S. C. §4705(f), which expressly states that order

[4] It is noteworthy that in renumbering the transfer tax signature provisions and adopting the unlawfulness rule for non-miller registrants, the 19[illegible] Treasury Decision was deemed sufficiently non-substantive to warrant adoption without notice of proposed rule-making. *See* 29 Fed. Reg. 8769 (1964).

[5] In fact, respondent apparently states that the registration requirements do not apply to, and expressly forbid, "itinerant" vending or peddling of marihuana. We believe that the occupational tax requirements do not apply to every person who makes a sale of marihuana, much less to every "handler" of marihuana, but only to those whose activities constitute an occupation such as that of a dealer.

forms for narcotics (not marihuana) are properly available to occupational registrants only. It is also invalid, as we read the act, because nothing in the language of the act or its legislative history justifies any such reference to legality. As respondent notes, the Marihuana Tax Act does not contain a provision like that of the Harrison Anti-Narcotic Act of 1914, 26 U. S. C. §4705(g), which makes it unlawful to obtain by means of order forms narcotic drugs (not marihuana) other than in a lawful business or legitimate practice of a profession. *See* quotation from Government's Brief in *Sanchez, supra.* As noted, this Marihuana Tax regulation did not appear until 1964.

Inspection of the legislative history will bear out that no such absolute restriction was intended in the Marihuana Tax Act. Rather, categories which could tend to include all "legitimate" possessors were enumerated in §4751, but it is clear that an illegitimate dealer, though "not likely" to register, could do so. The only statutory provision governing the relationship between registrants and state law has a meaning precisely opposite to 26 C. F. R. §152.23. It is 26 U. S. C. §4906, not cited by respondent (or petitioner), which provides as follows:

> The payment of any special tax imposed by this subtitle for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

Even if respondent's unsupported assertion that IRS officials would not have permitted petitioner to pay the tax is correct, it cannot help respondent's argument so long as the statute required petitioner to pay and required the government to accept payment. Moreover, it is interesting to note that respondent at least allows the possibility of an attempt by petitioner or other transferees to pay the tax. Respondent's Brief at 17, 24-25. Respondent's suggestion that such an attempt would not have subjected petitioner to a real threat of prosecution is highly unrealistic. The tax would be tendered to employees of the Internal Revenue Service district director's office in New York or wherever the proposed purchase was to take place. One can readily imagine that an attempt to pay the tax would arouse comment and curiosity among the IRS employees who deal with narcotics taxes. Communication of the relevant information to the United States, *i.e.*, to its agent Internal Revenue employees, would put in respondent's hands the information which might lead to prosecution under federal statutes such as 26 U. S. C. §176(a) and others. This in itself is incriminatory, even if the information is returned. Compare Respondent's Brief at 17, n. 16.

Moreover, there is no showing that petitioner knew of the return practice, if it exists, so that he may assert that he reasonably feared incrimination. Actually, voluntary tender, being so self-incriminatory, is so unlikely that any representation as to what IRS employees would have done when confronted with this novel circumstance is unreliable. Respondent, while suggesting that there is no record of a successful attempt to pay by a non-registrant (Respondent's Brief at 17), also indicates that there is

no record of a case of an *unsuccessful* attempt,[6] so that what the IRS would have done may be essentially a speculative conclusion influenced by the exigencies of litigation, although it may have been a procedure "known" by some.[7]

Furthermore, petitioner might have reasonably feared that information would be passed within the United States Government, including to the United States Attorney in New York and others who could have prosecuted under federal law, and to police in New York or other states where he lived or was thought to have possessed marihuana,

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[6] *Compare* Record, Testimony of Donald E. Miller, Chief Counsel United States Bureau of Narcotics, Feb. 6, 1968, in *United States* v. *Alston*, Crim. No. 991-66 (D. D. C. 1968), before Judge Oliver Gasch, at 11: "To my knowledge I don't recall anyone ever applying for this order form." *See* also Memorandum dated Feb. 7, 1968 from Mr. Miller to the Ass't United States Attorney, submitted in *United States* v. *Alston* pursuant to the request of Judge Gasch, at 1-2: "None of the persons I spoke with (including the chief of the collection division and the two persons under his supervision charged with the operation of processing order forms in the IRS Baltimore District Director's office) had ever heard of such an application being submitted."

[7] Mr. Miller also testified: "I would say that it (information obtained from applications) is not privileged." *Alston* Record at 18.

As to disposition of an unsuccessful application, Mr. Miller testified: "I can't answer you specifically whether it is given back to the applicant marked disapproved or whether it is retained on file." *Alston* Record 12. Upon further inquiry by the Court as to whether disapproved applications are returned or filed, Mr. Miller stated: "That I can't answer, sir. I think I ventured a guess when I said they would probably give it back . . . I would have to check I think with every District Director of Internal Revenue in the United States." *Alston* Record 16-17. The Court's request for information as to "only this jurisdiction" resulted in the cited Memorandum, in which the Baltimore official in charge stated "somewhat as follows": that the application would have been returned and that "he could perceive of no reason why the application form would have been retained in the files of the Internal Revenue Service." If this point is reached, petitioner should not be held to a higher standard of actual or constructive notice of the supposed "return" procedure than that of the Chief Counsel of the Bureau of Narcotics.

because of the statutorily required close cooperation of federal, district and state marihuana authorities. *See, e.g.*, 26 U. S. C. §4773. He certainly could not constitutionally be compelled to rely upon the occurrence of an internal failure of communication.

II.

As construed by respondent, the Marihuana Tax Act would violate various constitutional and statutory provisions.

1. We reject respondent's analogy to drivers' licenses. What is offensive to substantive due process, we contend, is a statute which imposes on petitioner an affirmative obligation restricting his liberty of conduct (to pay tax when acquiring marihuana and to transfer only in pursuance of an order form) and at the same time imposes upon law enforcement officials the duty (respondent alleges) to prevent petitioner from fulfilling his obligation, and then deprives petitioner of his liberty by imprisonment when the law enforcement officials prevent him from complying. This is not the same as forbidding him from acquiring, and punishing him when he does the forbidden act. The act of acquiring pursuant to official tax-paid order form has not been forbidden; it has been required but prevented. The concept of law enforcement officials being compelled to prevent citizens from complying with mandatory requirements of law is so repugnant that it should not be read into the statute. Where the requirements enjoined upon petitioner are expressed in the law, and the claimed requirements upon the law enforcement officials are derived only in respondent's brief, the conflict is easily

avoided by a proper interpretation of the statute, which may save the statute but which prevents prosecution of one asserting his self-incrimination privilege.

This argument is closely related to the void for vagueness and lack of notice argument. *Cf. United States* v. *Cardiff*, 344 U. S. 174 (1952). Where the statute does not make clear the elements of an offense, this defect is not cured by showing that petitioner committed an act which would violate both the unstated meaning and the stated but unintended meaning. Nor is it relevant whether petitioner actually considered the meaning of the statute or its relationship to the privilege against self-incrimination or anything else before he acted.[a]

The Administrative Procedure Act is relevant because if respondent's construction of the statute were permissible but not adequately spelled out in the statute itself, the spelling-out could be accomplished by a properly adopted administrative regulation published in the *Federal Register*. Since no such regulation had been promulgated, the Administrative Procedure Act, as in effect in 1965 at the time of the transfers to petitioner, provided that no person could "in any manner be required to resort to . . . procedure" not so published. Administrative Procedure Act,

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[a] In *Browning* v. *United States*, cited in respondent's brief at 27, the Ninth Circuit brushed aside a number of contentions raised in a 213 page brief which did not conform to the court rules. The passage respondent apparently relies upon merely says:

> Appellant next contends that it is impossible to pay the tax on marihuana which is referred to in 26 U. S. C. §4741. A short answer to this is that he was not charged with conspiring to fail to pay the tax, but was charged with conspiring to transfer marihuana not pursuant to a written order.

366 F. 2d 420, 422 (9th Cir. 1966).

§3(a), 5 U. S. C. §1002(a) (1964 ed.). Moreover, under the provisions added in 1966 by the Freedom of Information Act, no person shall in any manner be required to resort to "or be adversely affected by any matter required to be published in the Federal Register and not so published . . . except to the extent that . . . [he] has actual and timely notice of the terms thereof." 5 U. S. C. §552 (a)(1) (Supp. 1968). Under the amended provisions, it appears that petitioner cannot now be adversely affected by any matter which should have been published in the *Federal Register* and has not yet been so published. *See* Sobeloff, *The New Freedom of Information Act: What it Means to Tax Practitioners*, 27 J. TAXATION 130, 130-31, 134 (1967). It is apparent that if the validity of petitioner's conviction, in the light of *Grosso*, *Haynes* and *Marchetti*, rests upon respondent's unpublished construction of the Marihuana Tax Act, affirmance of the conviction would affect petitioner adversely and reversal is thus proper.

2. As interpreted by respondent, the Act would exceed the taxing power of Congress. On this interpretation, the constitutional doubts which, it is argued above, impelled Congress to require payment of the $100 tax were well founded.

In particular, respondent's interpretation would make the Act violate the requirement of Article I, Section 8, clause 1 of the Constitution that "all . . . Excises shall be uniform throughout the United States." The applicability of the tax cannot thus be made to depend upon legality under state law, which may vary both from state to state, and from time to time within a state. *Compare United States* v. *Constantine*, 296 U. S. 287 (1935); *Knowlton* v. *Moore*, 178 U. S. 41 (1900).

As discussed above, the revenue raising aspects of the Marihuana Tax Act and of the federal narcotics tax provisions have significant differences. On respondent's interpretation, if *Sanchez* were reconsidered today, we suggest that the prohibitory provisions would not stand. The $100 tax which cannot be voluntarily paid would be held to be a sham use of the taxing power. The same might well be true of the firearms and narcotics taxes upon a searching challenge today. *Compare* T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 86-87 (1956):

> Supposedly . . . [the taxing power] may not be used to suppress an enterprise if the Supreme Court can catch on to what it is up to . . . Hardly candid have been the opinions sanctioning excises on dispensing drugs, on sawed-off shotguns, on engaging in bookmaking (not publishing), and perhaps on some other enterprises that Congress thought needed watching.

It is clear from the legislative history and the provisions themselves that the sections of the law at issue were not premised upon the commerce power and cannot be sustained on that basis. Of course, with the broadening of the commerce power, it may well be that valid regulatory provisions can be framed, but that will require consideration by Congress of a new statute.

3. If the statute is really a licensing provision as to the transfer tax, it would also violate due process and the Administrative Procedure Act, *see* 5 U. S. C. §§551(9), (12), (13), 558(c), by failing to provide procedures for determining denial of an application to pay the tax, including provisions for hearing and review. Without such a determination, at least the respondent cannot use against

petitioner the conclusion that petitioner was not entitled to pay.

4. It is further submitted that if the prohibition turns upon state law, the statute constitutes an unconstitutional delegation of power to the states. If the statute somehow authorizes the making of regulations and administrative interpretations neither specifically authorized pursuant to a defined standard nor validly interpreting the statute, it constitutes an unconstitutional delegation of power to the administering agencies to determine the elements of a crime.

5. If the essence of the prohibited conduct is that it violates state law, the statute would raise a serious question as to whether it preempts District of Columbia or state law. *Compare Commonwealth* v. *Nelson,* 350 U. S. 497, 510 (1956). Moreover, there would be a serious question as to double jeopardy, in the absence of preemption.

6. In addition, we raise the argument that *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), applies, as do arguments advanced in *Scott* v. *United States,* Crim. App. No. 21,016 (D. C. Cir. April 29, 1968).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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